

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**CHARLES D. BARTLETT,
Grievant,**

v.

DOCKET NO. 2014-0565-DOT

**DIVISION OF HIGHWAYS,
Respondent.**

DECISION

Grievant, Charles D. Bartlett, filed this grievance against his employer, the Division of Highways, at level three on November 7, 2013, challenging the change in his pay status from non-exempt to exempt. As relief, Grievant seeks to be returned “to non-exempt status together with any reimbursement that may be due.”

A conference was held at level one on November 21, 2013, and a decision denying the grievance at that level was issued on February 13, 2014. Grievant appealed to level two on March 3, 2014, and a mediation session was held at level two on June 16, 2014. Grievant appealed to level three on June 30, 2014, and a level three hearing was held before the undersigned Administrative Law Judge on November 21, 2014, at the Grievance Board’s Westover office. Grievant appeared *pro se*, and Respondent was represented by Rachel L. Phillips, Attorney, Legal Division, Division of Highways. This matter became mature for decision on December 19, 2014, on receipt of Respondent’s written Proposed Findings of Fact and Conclusions of Law. Grievant declined to submit written proposals.

Synopsis

After a review of employees in Grievant's classification by Respondent, in October 2013, Grievant's overtime classification status was changed from non-exempt to exempt, based on a determination that Grievant's duties fit within the administrative and executive exemption of the Fair Labor Standards Act. Because Grievant no longer supervises at least two employees, he does not fit within the definitions in this exemption, and should be classified as non-exempt for overtime purposes.

The following Findings of Fact are made based on the record developed at the level three hearing.

Findings of Fact

1. Grievant is employed by the Division of Highway ("DOH") in the Construction Department in the Moundsville office, District Six, as a Transportation Engineering Technologist. He has been employed by DOH since 2007, and has been in his current position since 2012.

2. A grievance by another employee brought to the attention of DOH that some employees classified as Transportation Engineering Technologists who were classified as non-exempt for overtime purposes, should be classified as exempt. Accordingly, DOH audited all the Transportation Engineering Technologist positions in the state to determine whether any of them were improperly categorized for overtime purposes. As a result of this audit, in October 2013, Grievant's overtime status was changed by DOH from non-exempt to exempt, because it was determined that he supervised two or more employees.

3. The person previously employed in Grievant's position, Edward C. Lautar, completed a Position Description Form in 2005. Mr. Lautar stated on this form that he "manage[d] daily functions of the District construction office," and directly supervised three employees, the Finals Technician, an Office Assistant 2, and an Office Assistant 3. Daniel Sikora, the Assistant District Engineer of Construction for District Six at that time, signed the Position Description Form, and made no changes to it. Mr. Sikora testified at the level three hearing, however, that Mr. Lautar never supervised three employees, but they were just trying to get Mr. Lauter a raise.

4. Grievant was selected for his current position after the position was posted on June 4, 2012. The posting lists as duties of the position, "[o]versee and insure the operations of the District construction office, initiate and process change orders, contact reports, current and final subcontracts and correspondence, assign and review work of Office Assistants and Finals Technicians."

5. Grievant supervises one employee, a Finals Technician, and completes his evaluations. Grievant supervises the Office Assistant in the Moundsville Office at times. He completed her evaluation in 2013, and signed off on her time sheets. After being in another position for three years, Mr. Sikora returned to his position as the Assistant District Engineer of Construction for District Six in November 2013. Mr. Sikora completed the Office Assistant's evaluation in 2014, and started signing off on her time sheets in November 2013.

6. Grievant completed a Position Description Form in December 2013. Grievant stated on this form that he supervised one and a half employees, the Finals Technician full-time, and an Office Assistant, sharing her supervision with other office personnel. Mr.

Sikora signed this form without making any comments or changes. Attached to the form was an Organization Chart, signed only by Mr. Sikora, which shows Grievant directly supervising only the Finals Technician. The Office Assistant is shown on the chart under the Finals Technician, the Technicians/Inspectors, and Mr. Sikora. The Position Description Form was submitted to John McBrayer, Acting Director, Human Resources Division, Department of Transportation.

7. The Position Description Form completed in December 2013, by Grievant, describes the general purpose of the job as:

To interact with and provide information and documents, relating to the initialization and progression of construction projects, to the Assistant District Engineer (Construction), for his review and/or approval.

To oversee and insure the concurrent review (aka "Red Check") of estimate quantities, contractor payments, and, contract finalization as same is performed by the district Finals Technician.

To perform general office duties such as the processing and filing of paperwork, retaining project records, performing record searches, and, various other duties as may be assigned by the Assistant District Engineer (Construction).

Discussion

Grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). A preponderance of the evidence is defined as evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as

a whole shows that the fact sought to be proved is more probable than not. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

The Fair Labor Standards Act provides that employees are entitled to compensation at time and a half, or compensatory time off, for time worked beyond forty hours per week. However, certain employees are “exempt” from this requirement. They include administrative, executive and professional employees, volunteers, independent contractors, occasional or substitute employees, fire protection and law enforcement employees, hospital or residential care employees, prisoners, and trainees. Respondent believes Grievant is exempt from overtime pay based on the executive exemption in the Fair Labor Standards Act.

The Fair Labor Standards Act provides for various exemptions from wage and hour requirements, including:

a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities);

29 U.S.C. § 213.

The applicable federal regulations provide the following additional definitions:

(a) The term “employee employed in a bona fide executive capacity” in section 13(a)(1) of the Act shall mean any employee: (1) Compensated on a salary basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities; (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (3) Who customarily and regularly directs the work of two or more other employees; and (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

29 C.F.R. § 541.100.

29 C.F.R § 541.102 defines management as:

Generally, “management” includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked, and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

There is no question in this case regarding whether Grievant meets the salary requirements of the executive exemption. Grievant argued that he did not supervise at least two employees, and that his primary duty was moving paper, not managing. Respondent argued it properly based its determination that Grievant should be classified as exempt on the information of record, being Mr. Lautar’s Position Description Form, the

organizational chart that had gone through the appropriate approval process, and the posting for Grievant's position.

Grievant demonstrated that the way the Moundsville office is managed has changed since he was selected for his current position, and that, as of November 2013, he no longer supervises at least two employees. Grievant also no longer acts as a manager of the office, although the record is not clear as to whether this evolution was immediate with Mr. Lautar's departure, or occurred over time. While these changes may not have gone through the proper approval process, and may well have rendered Grievant misclassified as Respondent suggested, the fact is that, at least as early as November 2013, Mr. Sikora became the Office Assistant's primary supervisor, leaving Grievant supervising fewer than two employees, full-time. Grievant does not fit within the administrative and executive exemption, and should be classified as non-exempt for overtime purposes.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving his grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).
2. "Administrative and executive employees are exempt from the requirement that employers provide overtime pay for all hours worked in excess of forty hours per week pursuant to the Federal Fair Labor Standards Act. See 29 U.S.C. 209-219; W. VA. CODE

§ 21-5C-1; *Adkins v. City of Huntington*, 191 W. Va. 317, 445 S.E.2d 500 (1994).” *Decapio and Beauty v. Division of Highways*, Docket No. 03-DOH-357 (Mar. 11, 2004).

3. The applicable federal regulations provide the following additional definitions:

(a) The term “employee employed in a bona fide executive capacity” in section 13(a)(1) of the Act shall mean any employee: (1) Compensated on a salary basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities; (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (3) Who customarily and regularly directs the work of two or more other employees; and (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

29 C.F.R. § 541.100.

4. Grievant does not fall within the administrative and executive exemption of the Federal Fair Labor Standards Act and he should be classified as non-exempt for overtime purposes.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to change Grievant’s overtime classification status to non-exempt, effective November 1, 2013, and to pay him for any overtime he worked from that date through the date of this Decision.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: February 3, 2015